THE HIGH COURT
JUDICIAL REVIEW

2024 514 JR

BETWEEN

MARK KIERNAN

APPLICANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 March 2025

INTRODUCTION

1. These judicial review proceedings seek to challenge a determination by the financial services and pensions ombudsman ("*the ombudsman*"). The determination had been to the effect that the ombudsman did not have jurisdiction to entertain a complaint in circumstances where the complainant did not have the requisite standing.

2. The principal issues addressed in this judgment are as follows. First, whether there are grounds for granting an extension of time for the bringing of the judicial review proceedings. Secondly, whether a non-proving executor, who has

reserved his rights, has standing to pursue a complaint before the ombudsman in respect of the denial of access to a deceased person's banking records.

3. It should be noted that the impugned decision was made by an officer of the ombudsman pursuant to an authorisation under section 15 of the Financial Services and Pensions Ombudsman Act 2017 ("*FSPO Act 2017*"). It is expressly provided that an act or thing done by a person within the scope of the authority given by the ombudsman has the same force and effect as if done by the ombudsman. For ease of exposition, the impugned decision will be referred to throughout this judgment as a decision of "*the ombudsman*" rather than that of the authorised delegate.

PROCEDURAL HISTORY

4. The complaint to the ombudsman, which forms the subject-matter of these judicial review proceedings, relates to two bank accounts which had been held with the Educational Building Society ("*the financial service provider*"). It appears that the bank accounts had initially been held in the applicant's mother's sole name. Thereafter, the accounts had been converted to joint accounts held in the names of the applicant's mother and sister.

5. The applicant's mother died on 28 May 2015. It appears that there is an ongoing dispute between the applicant and his sister as to whether the sister is entitled to the funds in the bank accounts by virtue of a right of survivorship. Put otherwise, there is a controversy as to whether the sister, as the surviving account holder, became beneficially entitled to the funds in the bank accounts on the death of the mother. The alternative analysis is that the funds would fall to be distributed as part of the deceased's estate.

6. The applicant and his sister had been named as executors under the terms of their deceased mother's will. In the event, however, the applicant's sister alone took out a grant of probate. The grant is dated 8 August 2017 and reads, in relevant part, as follows:

> "BE IT KNOWN that on the 8th day of August 2017 the last Will a copy of which signed by me is hereunto annexed of KATHLEEN KIERNAN late of […] Homemaker deceased who died on or about the 28th day of May 2015 at St Francis Hospice Dublin was proved and registered in the Probate Office and that the Administration of all the estate which devolves on and vests in the personal representative of the said deceased was granted by the Court to CLAIRE O'DWYER of […] Homemaker daughter of the deceased one of the executors named in the said Will she having first sworn faithfully to administer same
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> Reserving the rights of the other Executor"

7. The applicant sought information from the financial service provider in relation to the bank accounts by letter dated 5 July 2022. The correspondence culminated in a letter of 23 January 2023 from the financial service provider to the effect that it was bound to adhere to the instructions outlined in the grant of probate which had appointed the applicant's sister as administrator.

8. The applicant purported to make a complaint to the ombudsman on 23 February 2023. The complaint has been characterised in the following terms by the ombudsman: the financial service provider failed to furnish information regarding the deceased's account as requested.

9. The ombudsman issued a "*preliminary opinion on jurisdiction*" on 24 July 2023. The applicant had been afforded, and availed of, an opportunity to make submissions on this preliminary opinion. A "*final determination*" was issued on 19 September 2023. Having cited section 45 of the Financial Services and Pensions Ombudsman Act 2017, the opinion states as follows:

> "As outlined in the Preliminary Opinion, the High Court Grant of Probate dated 8 August 2017 which has been provided to this Office, does not name the Complainant, Mr. Kiernan as personal representative. Rather, it outlines that the '*personal representative*' of the deceased is Ms. Claire O'Dwyer.
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> In these circumstances, it is this Office's final determination that the Complainant, Mr Kiernan is not the '*appropriate person*' to make a complaint to this Office on behalf of the Estate of the late Mrs. Kiernan for the purposes of section 45. While we note that the Complainant, in his letter dated 4 May 2023, explained that he is an executor named in his mother's will and that he is '*exercising* [his] *rights as reserved in the approved Grant of Probate*', as he has not been formally appointed as the '*personal representative*' of the Estate in the Grant of Probate, it is this Office's view that he is not entitled to make a complaint on behalf of the Estate of the late Mrs. Kiernan about her account to this Office and this Office cannot proceed with the investigation of this complaint."

10. As appears, the ombudsman concluded that the applicant was not an "*appropriate person*", within the meaning of section 45 of the FSPO Act 2017, to make a complaint on behalf of the estate of his deceased mother in circumstances where he had not been formally appointed personal representative in the grant of probate.

11. The applicant seeks to challenge that determination in these judicial review proceedings. The applicant filed a statement of grounds and verifying affidavit in the Central Office of the High Court on 11 April 2024. The applicant moved an *ex parte* application for leave to apply for judicial review before the High Court (Hyland J.) on 10 June 2024. Leave was granted in terms of an amended statement of grounds.

12. The proceedings came on for substantive hearing before me on 6 March 2025. Judgment was reserved.

JUDICIAL REVIEW IS APPROPRIATE PROCEDURE

13. The present proceedings take the form of an application for judicial review under Order 84 of the Rules of the Superior Courts, rather than a statutory appeal pursuant to Part 7 of the Financial Services and Pensions Ombudsman Act 2017. The statutory right of appeal is expressly confined to a "*decision*" of the ombudsman under section 60 or section 61. Put otherwise, the right of appeal is confined to a decision made by the ombudsman following the *completion* of the investigation of a complaint.

14. Both parties are agreed that the statutory right of appeal does not extend to a preliminary decision by the ombudsman on the admissibility of a complaint. Such a preliminary decision does not come within the meaning of "*decision*" for the purposes of Part 7 of the Act. This is because such a preliminary decision is concerned with the potential *commencement* of a formal investigation, whereas the statutory right of appeal only arises upon the completion of the investigation. See, generally, *Suarez v. Financial Services and Pensions Ombudsman* [2022] IEHC 46 and *Trustees of Vodafone Ireland Pension Plan v. Financial Services and Pensions Ombudsman* [2022] IEHC 47.

FAILURE TO SERVE FINANCIAL SERVICE PROVIDER

15. In accordance with Order 84, rule 22, the applicant should have served notice of these proceedings on the financial service provider the object of the complaint, namely the Educational Building Society. The financial service provider is a person "*directly affected*" in that the precise purpose of the proceedings is to seek to reagitate a complaint made against it. To elaborate: were the applicant to succeed in these judicial review proceedings, then a complaint which had

previously been ruled inadmissible by the ombudsman would be reanimated. This would have the consequence that the financial service provider would be arraigned once again before the ombudsman in respect of the same complaint. The financial service provider is entitled to notice of, and to participate in, judicial review proceedings seeking such an outcome.

16. For the reasons which follow, the applicant's failure to serve the proceedings on the financial service provider is not fatal in the particular circumstances of this case. The solicitors acting on behalf of the ombudsman, very helpfully, notified the financial service provider of the existence of the proceedings and of the assigned hearing date. The AIB Legal Department subsequently confirmed that EBS DAC did not intend to be formally represented in the matter. It is apparent, therefore, that the financial service provider had been afforded the opportunity of participating in the proceedings as a notice party but has chosen not to do so.

THREE MONTH TIME-LIMIT / EXTENSION OF TIME

17. Order 84, rule 21 of the Rules of the Superior Courts provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

18. The within proceedings were instituted *prior* to the coming into effect of the amendments introduced by the Rules of the Superior Courts (Order 84) 2024 (S.I. No. 163/2024). The amendments came into effect on 26 April 2024. These proceedings were instituted on 11 April 2024. Under the procedure then in force, the three month time-limit would only stop running once an *ex parte* application for leave had been made in open court: *Heaney v. An Bord Pleanála* [2022] IECA 123 (at paragraphs 57 to 65). It follows that the application in the

present case cannot be regarded as having been "*made*" until the leave application was moved before the High Court (Hyland J.) on 10 June 2024.

19. The impugned decision had been notified to the applicant on 19 September 2023. The application was, therefore, well outside the three month time-limit prescribed. Indeed, even if time were to be reckoned from the earlier date of the filing of the papers in the Central Office of the High Court (11 April 2024), the proceedings would already have been out of time by almost four months.

20. Order 84, rule 21(3) and (4) confer discretion on the High Court to extend time as follows:

> "(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:
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> (a) there is good and sufficient reason for doing so, and
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> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:
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> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by the applicant for such extension.
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> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

21. The obligations to be complied with by an applicant who seeks an extension of time are prescribed under Order 84, rule 21(5). This rule provides that an application for an extension of time shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's

failure to make the application for leave within the period prescribed and shall verify any facts relied on in support of those reasons.

22. The Supreme Court in *M. O'S. v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 ILRM 149 has confirmed that an applicant, who does not apply for leave to issue judicial review within the time specified, is required to furnish good reasons which explain and objectively justify the failure to make the application within the time-limit, and which would justify an extension of time up to the date of institution of the proceedings.

23. The principles governing the extension of time have been considered more recently by the Court of Appeal in *Arthropharm (Europe) Ltd v. Health Products Regulatory Authority* [2022] IECA 109. Relevantly, the Court of Appeal (*per* Murray J.) held that the factors of which account may be taken will include: the nature of the order or actions; the subject of the application; the conduct of the applicant; the conduct of the respondent; the effect of the decision it is sought to challenge; any steps taken by the parties subsequent to that decision; and the public policy that proceedings relating to the domain of public law take place promptly except where good reason is furnished.

24. The Court of Appeal also emphasised (at paragraph 125) that in the vast majority of applications for an extension of time, the court has no role in assessing the strength of the underlying merits of the proceedings. This is subject to a possible exception where an applicant's case was extremely strong to the point that the only extant issue in the proceedings was whether time should be extended.

25. The applicant in the present case has failed to comply with the requirements of Order 84, rule 21(5). The applicant has failed to provide, on affidavit, any explanation whatsoever for his delay. The impugned decision was notified to

the applicant on 19 September 2023. A period of almost seven months elapsed between the date of the impugned decision and the filing of the papers in the Central Office of the High Court (11 April 2024), with a further two months passing before the *ex parte* leave application was moved before the High Court (10 June 2024).

26. Having regard to the absence of any explanation, and the length of the delay, there is no proper basis for granting an extension of time.

ENTITLEMENT TO MAKE A COMPLAINT

27. For the reasons explained under the previous heading, these judicial review proceedings are out of time and there is no proper basis for granting an extension of time. These findings are sufficient to dispose of the proceedings. Notwithstanding this, it is proposed to address, *de bene esse*, the grounds of judicial review pleaded. This is because the proceedings raise an issue of statutory interpretation in respect of the entitlement to make a complaint which is of general public importance. The issue has been fully argued before the court. The financial service provider is not prejudiced by having this issue decided now in circumstances where, as appears presently, the outcome does not reanimate the complaint.

28. The principal issue which arises for consideration is whether a non-proving executor, who has reserved his rights, has standing to pursue a complaint before the ombudsman.

29. The ombudsman purported to resolve this issue by reference to section 45 of the FSPO Act 2017 which reads, in relevant part, as follows:

> "Where a complainant dies, is a minor or is otherwise unable to act for himself or herself, then—

> (a) any complaint which a complainant might otherwise have made or referred under this Part may be made or referred by the appropriate person, and
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> (b) anything in the process of being done by or in relation to a complainant under or by virtue of this Part may be continued by or in relation to the appropriate person,
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> and any reference in this Part, other than in this section, to a complainant shall be construed as including a reference to the appropriate person."

30. In circumstances where the complainant has died, an "*appropriate person*" is defined under section 45(2) as meaning his or her legal personal representative.

31. As appears, these provisions allow for a complaint, which might otherwise have been made by a deceased person prior to their death, to be made by his or her legal personal representative. This would cover a contingency where the legal personal representative of a deceased person discovers that there had been an irregularity in the operation of a bank account during the lifetime of the now deceased individual. One obvious example would be where it is alleged that there had been an overcharging of interest on a tracker mortgage account.

32. Section 45 does not extend to embrace the contingency which arises in the present case, i.e. where the complaint is that the financial service provider is wrongfully refusing to allow a non-proving executor access to a deceased person's banking records. By definition, a complaint of this type can only ever arise post-death and cannot, therefore, be a complaint which might otherwise have been made during the lifetime of the now deceased individual.

33. The correct resolution of the dispute as to the admissibility of the complaint turns, instead, on the definitions provided for under section 2 of the FSPO Act 2017. A "*complainant*" is defined as meaning, relevantly, a person who makes

a complaint under section 44(1) who is an "*actual or potential beneficiary*" of a financial service. The term "*actual or potential beneficiary*" is, in turn, defined as meaning—in relation to a complaint concerning a financial service provider—a consumer, any surviving dependant of a consumer, a legal personal representative of a deceased consumer, a widow, widower or surviving spouse or civil partner of a deceased consumer or any person who is contractually entitled to benefit from a long-term financial service.

34. The key term here is "*legal personal representative*". The dispute in the present case reduces itself to the question of whether a non-proving executor, who has reserved his rights, comes within the concept of a legal personal representative. To answer this question, it is necessary to examine the status of a non-proving executor by reference to the Succession Act 1965. This is because the term "*legal personal representative*" has not been separately defined for the purpose of the FSPO Act 2017. It is appropriate, therefore, to have regard to the general legislative context against which the latter Act had been enacted. The centrepiece of the legislative context is the Succession Act 1965.

35. The term "*personal representative*" is defined under that Act as meaning the executor or the administrator for the time being of a deceased person.

36. Section 20(1) of the Succession Act 1965 provides as follows:

> "Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, all the powers which are by this Act or otherwise by law conferred on the personal representative may be exercised by the proving executor or executors or the survivor or survivors of them and shall be as effectual as if all the persons named as executors had concurred therein."

37. The meaning and effect of this section has been explained as follows in Spierin, *The Succession Act 1965 and Related Legislation: A Commentary* (Bloomsbury Professional, 6th edn., 2024) at paragraph 135:

> "This section repeats s 18(2) of the Administration of Estates Act 1959. It deals with the case where not all the executors named in the will extract a grant of probate. It operates as a safeguard to a person dealing with those executors who have proved, it does so by providing that the proving executors may exercise all the powers conferred by law on personal representatives and that their acts shall be as effectual as if the non-proving executors had concurred. This enables the administration of an estate to progress and be finalised notwithstanding that the grant of probate may reserve the right of one or more executors named in the will subsequently to prove the will (by a grant of double probate when the primary grant is still extant and by grant of unadministered probate when the person who proved under the primary grant has died leaving part of the estate unadministered.)"

38. The concept of "*double probate*" has been described as follows in Lehane, *Succession Law* (Bloomsbury Professional, 4th edn., 2022) at paragraph 5.141:

> "As covered above, a grant of double probate can be applied for by an executor who reserved his rights when his co-executor extracted a grant of probate and now wishes himself to act by applying for a second grant. This second grant concurrent with the first grant, allows both executors to work together in the administration of the estate. Whilst there is no legal requirement that they act jointly in the administration of moveable assets other than practical difficulties that may well arise, proving LPRs must act jointly selling land."
>
> *Footnotes omitted

39. It is apparent from the foregoing that the legal effect of the reservation of rights by a non-proving executor is prospective in nature. It allows them to apply, at a subsequent date, for a grant of probate (whether in the form of a grant of double probate or a grant of unadministered probate). Pending the issuing of such a grant, however, a non-proving executor does not have the status of a legal personal representative. This status is confined, in this context, to the proving

executor or executors for the time being of the deceased person. It follows, therefore, that the applicant in the present case did not have the requisite standing to pursue a complaint before the ombudsman. The fact that he had reserved his right to apply in the future to take out a further grant of probate did not confer any immediate right to intermeddle in the administration of the estate. The applicant is not a "*legal personal representative*" for the purposes of the FSPO Act 2017.

40. The impugned determination is thus correct insofar as the outcome is concerned: the ombudsman correctly concluded that he does not have jurisdiction to entertain the purported complaint. However, the reasoning by which the ombudsman reached that conclusion had been erroneous in law. The reliance on section 45 of the FSPO Act 2017 was misplaced for the reasons explained earlier.

41. It would, in principle, be open to the court to set aside the impugned determination and remit the question of the admissibility of the complaint to the ombudsman with a direction to reconsider it and reach a decision in accordance with the findings of the court. Such an exercise would be of no practical benefit, however, in that the ultimate outcome would be the same, i.e. the complaint would be inadmissible.

42. The question arising in these judicial review proceedings is a pure question of law, turning on the proper interpretation of the FSPO Act 2017. This is not a situation where the application of the legislation to the particular circumstances of the case may require the resolution of disputed questions of fact or the consideration of matters of policy. There is no necessity, therefore, for the court to defer to the views of the ombudsman. The type of issue arising in the present

proceedings is entirely distinguishable from that discussed in *Trustees of Vodafone Ireland Pension Plan v. Financial Services and Pensions Ombudsman* [2022] IEHC 47 (at paragraphs 49 and 50).

CONCLUSION AND PROPOSED FORM OF ORDER

43. For the reasons explained at paragraphs 17 to 26 above, these judicial review proceedings are out of time and there is no proper basis for granting an extension of time. These findings are sufficient to dispose of the proceedings.

44. Notwithstanding this, the grounds of judicial review pleaded have been addressed *de bene esse*. This is because the proceedings raise an issue of statutory interpretation in respect of the entitlement to make a complaint which is of general public importance. For the reasons explained at paragraphs 27 to 42 above, the admissibility of a complaint to the ombudsman of the type at issue in this case turns on the definitions of "*complainant*" and "*actual or potential beneficiary*" provided for under section 2 of the FSPO Act 2017. A non-proving executor, who has reserved his rights, does not have standing to pursue a complaint before the ombudsman in respect of the denial of access to a deceased person's banking records. The fact that a non-proving executor has reserved the right to apply in the future to take out a further grant of probate does not confer any immediate right to intermeddle in the administration of the estate.

45. As to the costs of the proceedings, my *provisional* view is that there should be no order as to costs, i.e. that each party should bear its own legal costs. Whereas the applicant has been unsuccessful—and would thus normally be liable to pay the other side's costs—it is at least arguable that the proceedings have had the benefit of clarifying the law in relation to the making of complaints to the

ombudsman in respect of the estate of a deceased person. The majority judgment in *Little v. Chief Appeals Officer* [2024] IESC 53 (*per* Murray J., at paragraphs 66 to 71) confirms that the High Court retains a discretion not to award costs against an unsuccessful applicant in public interest proceedings.

46. These proceedings will be listed before me on Tuesday 25 March 2025 at 10.30 o'clock to hear submissions on costs and to make final orders.

Appearances

The applicant appeared as a litigant in person
Neasa Bird for the respondent instructed by Fieldfisher Ireland LLP

Approved Garrett Simons